



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Enclave One Inc.; Ward Jones Construction Co.
File: B-232383, B-232383.2
Date: November 17, 1988

DIGEST

1. Where the protester was rejected as nonresponsible because the contracting officer was not provided with sufficient information to permit finding the sureties on the protester's individual surety bid bond acceptable and the record shows the nonresponsibility determination was reasonably based, rejection of the protester's bid was proper.
2. Protest to the General Accounting Office following an initial protest to the contracting agency is untimely when it is not filed within 10 working days of the protester's receipt of notification of the agency's denial of the initial protest, notwithstanding the fact that the protester continued to pursue the matter with the agency following the initial denial.

DECISION

Enclave One Inc. and Ward Jones Construction Co. protest the award of a contract to Texas-Capital Contractors under invitation for bids (IFB) No. DACA05-88-B-0102, issued by the United States Army Engineer District, Sacramento, California for improvement of family housing units. Enclave contends that its low bid was improperly rejected based on an unwarranted finding that its bid bond using individual sureties was unacceptable. Ward Jones contends that it should receive the award because the next lower bidder after Enclave, Texas-Capital, should have been required to withdraw its bid after alleging a mistake in its bid price.

We deny Enclave's protest and dismiss the Ward Jones protest as untimely.

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FACTS

The IFB requested prices on a base item and on eight additive items. Award was to be made to the bidder offering the lowest base price, plus, in order of priority listed in the IFB schedule, those additive items which provided the most features within the agency's available funds. The three lowest base item bids were received from Texas-Capital at \$3,296, Enclave at \$3,150,823, and Ward Jones at \$3,450,000. The contracting officer, pursuant to Federal Acquisition Regulation (FAR) § 14.406-1, requested that Texas-Capital verify its extremely low price. That firm replied that it misplaced a decimal point and that its price should have been \$3,296,000. The contracting officer permitted the price to be corrected as a clerical mistake. The correction made Texas-Capital the second low bidder. After the Corps decided to reject Enclave's bid because of the individual sureties on its bid bond, Texas-Capital was determined to be the low bidder and received the award. Ward Jones was next in line for award.

ENCLAVE PROTEST

Enclave's bid was rejected because the individual sureties on its bid bond were found nonresponsible. Enclave submitted a bid bond naming two individual sureties in response to the IFB bid guarantee requirement. In reviewing the affidavits of individual surety, Standard Form (SF 28), that Enclave had submitted with its bond, the agency noted that one of the sureties stated that he was not a surety on any other bonds. Based on other information which threw doubt on the validity of this statement, the agency requested Enclave to provide further information. In response to the request, the agency was informed that the surety in question had in fact been surety on one performance and payment bond in the amount of \$2,840,842.03. Since this still conflicted with the agency's understanding, it sought to establish the net worth of both of Enclave's sureties.

Accordingly, the agency, by letter of July 8, requested Enclave to submit further documentation such as copies of mortgages and deeds, appraisals for personal property and copies of share certificates. In response, the agency was furnished with an audited financial statement of one surety's corporate business. The agency concluded that the information received did not establish the responsibility of the two sureties. It was the agency's view that data concerning one surety's corporate business was not relevant as that surety's personal assets were pledged rather than

the assets of the corporation. Further, the submission contained no information at all concerning the second surety. Enclave was therefore found to be nonresponsible based upon the unacceptability of its individual sureties and its bid was rejected.

Enclave protests the propriety of the rejection of its bid. While not specifically disputing the Corp's conclusions concerning the assets of the two sureties, Enclave contends that the regulations do not permit the scrutiny given the sureties here. Enclave argues that it made a good faith and timely effort to supply the information requested of it and that if this effort was insufficient it resulted from miscommunications and should not have resulted in the rejection of its bid.

A bid guarantee's purpose is to secure the liability of a surety to the government in the event the bidder fails to fulfill its obligation to execute a written contract and to provide payment and performance bonds. When, as here, a required bid bond is found to be proper on its face, the bid itself is responsive. Such a bid bond is proper "on its face" when it has been duly executed by two individual sureties whose affidavits indicate that they both have net worths at least equal to the penal amount of the bond, and the bid bond contains no obvious facial defects, such as submission of a blank bid bond, or markup or alteration of the bond without evidence of surety approval. Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. ___, 87-2 CPD ¶ 3.

The accuracy of the information contained in the SF 28, which is the issue here, is a matter of responsibility. See Transcontinental Enterprises, Inc., B-225802, *supra*. Although a determination of nonresponsibility based upon the financial acceptability of an individual surety may be based upon information submitted any time prior to award, that determination may not be waived as no award may be made without an affirmative determination of responsibility. T&A Painting, Inc., B-224222, Jan. 23, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 86. The contracting officer's obligation to investigate individual sureties is set out at FAR § 28.202-2, which requires the contracting officer to "determine the acceptability of individuals proposed as sureties." The regulation states that "[T]he information provided [in SF 28] is helpful in determining the net worth of proposed individual sureties." In making this determination, the agency therefore is not limited to the consideration of information contained in SF 28. There is nothing to prevent the contracting officer from going beyond that information where necessary in making his decision.

Transcontinental Enterprises, Inc., B-225802, supra. Moreover, the contracting officer is vested with a wide degree of discretion and business judgment in making this determination. Therefore, we will defer to this judgment unless the protester shows that the decision was without a reasonable basis. See Eastern Metal Products & Fabricators, Inc., B-220549.2 et al., Jan. 8, 1986, 86-1 CPD ¶ 18. In our view, the record here reflects a reasonable basis for the nonresponsibility determination.

When it found that one of the affidavits contained inaccurate information regarding the surety's outstanding bond obligation, the agency reasonably sought information beyond that on the face of the SF 28 to establish the responsibility of the sureties. It was Enclave's failure to provide the requested information concerning the net worth of both of the sureties which resulted in the determination of nonresponsibility. In this respect, we do not see how, as the protester argues, miscommunication caused the problem since the Corps' letter quite clearly specified the information required of Enclave. While an agency may permit a prospective awardee a reasonable amount of time to answer questions going to the responsibility of its sureties, it is not required to delay award indefinitely while a bidder attempts to respond to those questions. Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 CPD ¶ 29. We think that the agency acted reasonably in its pursuit of information concerning the sureties and that the record supports the agency's determination concerning the responsibility of the individual sureties.

WARD JONES PROTEST

Ward Jones argues that Texas-Capital was improperly permitted to correct its bid. Ward Jones notes that the value of this procurement was apparent prior to bid opening and that a competent general contractor could hardly have bid \$3,296 for a job that was clearly worth more than \$3 million.

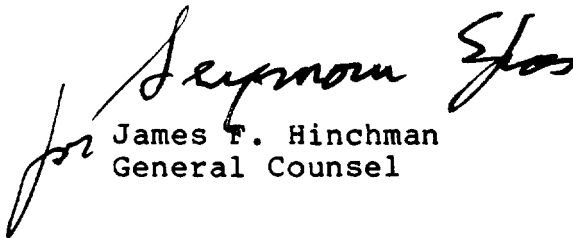
We dismiss the protest as untimely.

By letter of June 20 to the Corps, Ward Jones protested the agency's decision to permit Texas-Capital to correct its bid. The agency denied the protest on June 24 on the basis that the mistake was a correctable clerical error. By letter of July 11, Ward Jones agreed to extend its bid acceptance period and continued to protest the correction. The Corps replied by letter dated August 3 which stated that after again reviewing the bidder's arguments the agency

found no basis to reverse its decision to permit correction. After its receipt of this letter, Ward Jones filed its protest with our Office on August 29.

If a protest is timely filed with the contracting agency, our Bid Protest Regulations require that any subsequent protest to this Office be filed within 10 working days of notice of the agency's initial adverse action. 4 C.F.R. § 21.2(a)(3) (1988). Ward Jones' protest filed with our Office on August 29 was untimely because it was not filed within 10 working days of Ward Jones' receipt, sometime prior to July 11, of the agency's June 24 denial of the initial protest. The exchange of correspondence after Ward Jones' receipt of the agency's initial denial does not make the protester's August 29 protest to our Office timely. Our regulations make it clear that it is knowledge of the initial adverse agency action on a protest at that level that triggers the 10-day period for filing a subsequent protest to our Office. 4 C.F.R. § 21.2(a)(3); Art Specialty Co., Inc.--Reconsideration, B-224130.2, Sept. 15, 1986, 86-2 CPD ¶ 301. The fact that a firm continues to pursue a denied protest with the contracting agency does not warrant our consideration of the subsequently filed protest that does not comply with § 21.2(a)(3).

The protest of Enclave is denied; that of Ward Jones is dismissed.


for James F. Hinchman
General Counsel